IN THE

# SUPREME COURT OF THE UNITED STATES

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October Term, 1976

No. 76-565

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John H. Bailey, *Petitioner*

*v.*

State of Delaware, *Respondent*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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Richard R. Wier
Richard J. McMahon
*Counsel for Respondent*

State of Delaware
Department of Justice
Third Floor, Wilmington Tower
Wilmington, Delaware 19801

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JOHN H. BAILEY, PETITIONER

v.

STATE OF DELAWARE, RESPONDENT

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Brief in opposition to Petition for a Writ of Certiorari to the Delaware Supreme Court

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Respondent opposes the issuance of a Writ of Certiorari to Review the judgment of the Delaware Supreme Court in the above case.

## STATEMENT OF THE CASE

The respondent differs with the Statement of the Case offered by the petitioner in so far as that statement characterizes various aspects of the case

and draws conclusions therefrom but the overview of the various proceedings, which is found therein, appears sufficient and will not be repeated. The opinion of the Supreme Court of Delaware contains a synopsis of the facts of this case which is considered to be quite concise and accurate by the respondent.

There was in fact publicity after the shooting of Sheila Ferrell. The victim was shot on August 17, 1976, and did not die until August 30, 1976, although there was no hope medically for her recovery from the moment that she was admitted to the hospital. The Mayor of Wilmington at no time referred to the defendant. The defendant never claimed that the shooting was justifiable.

The jury was not sequestered during the trial but extreme care was exercised in its selection and instruction. In addition the trial Court kept daily check on any prejudicial information which may have reached the jury throughout the trial. There were in fact no incidents involving the jury's being exposed to matters not in evidence.



During the trial five eyewitnesses testified to seeing the defendant shoot the victim in the back with a handgun. The defendant admitted that he was chasing the girl when she was shot but stated that he had a car door handle in his hand during the chase rather than a gun. Moreover the defendant admitted pointing the car door handle in the same manner which the State's witnesses had testified he pointed the gun. This contradicted the statement which the defendant had made to the police after his arrest in which he admitted having a gun at the scene of the shooting.

The jury began its deliberations late in the afternoon on December 15, 1976. Early in the evening the jury was conducted to the DuPont Hotel for dinner. The jury was in the charge of three sworn bailiffs and at least three additional bailiffs. These bailiffs shielded the jury from contact with all other persons throughout the trips to and from the hotel and during the dinner itself. The police officers who guarded the periphery of the party had been involved in the case from the beginning. They were present at the courthouse awaiting the verdict,

as was the judge. There was no contact between these officers and the jury. The meal, which was eaten at the hotel by the various people awaiting the verdict in the courthouse, was not a social occasion and did not give the appearance of such.

The jury did not reach its verdict that night and, remaining sequestered, spent the night at the DuPont Hotel. The verdict was reached at approximately noon on December 16, 1976.

The prosecutor indicated during closing argument that the timing of the revelation concerning the identity of the person claimed by the defendant to be responsible for the shooting was probably the most probative point in analyzing the defendant's testimony. It was pointed out that a previous witness for the defense had claimed to have seen a black man standing near the chase scene. It was also pointed out that the defendant had said in his direct testimony that a black man was responsible for the shooting. It was emphasized that the identity of this black man (Willie Johnson, a witness for the State) was not revealed by the defense until the State's cross-examination when it was asked for



specifically. This was claimed to be probative in that it indicated the awareness of the defense of the fact that it would be very difficult for the jury to accept a theory which was based upon Willie Johnson's having done the shooting.

It was also pointed out by the State that the defendant chose to incriminate rather than exculpate himself at the time of arrest and that his explanation that he hid from the police so that his father could help him explain what he had done was not consistent with innocence.

## REASONS FOR DENYING THE WRIT

A. The Petitioner was not Deprived of Due Process by Any Matter During the Jury Deliberations Because the Jury was Directly Controlled and Shielded by the Sworn Bailiffs and the Meal at which the Trial Judge was Present was Clearly not A Social Occasion and Did not Convey Any Message to the Jury Concerning Any Opinion of the Trial Judge.

The petitioner claims that prejudice resulted from the actions of certain officers who were witnesses in the case in guarding the jury on its journey to dinner and being present at dinner at the same table as the trial judge. Moreover the

petitioner claims that this Court should review the decision of the Delaware Supreme Court because this case presents the first occasion when two such matters occurred together. The fact is that neither aspect referred to by the petitioner amounted to the type of incident which was considered prejudicial in the cases cited by the petitioner.

The petitioner has cited, inter alia, State v. Duvel, 4 N.J. Misc. R.719, 134 A. 283(1926) and Guzzi v. Jersey Central Power and Light Company, 36 N.J. Supr, 255, 115 A.2d 629(1955). The petitioner urges that these cases demonstrate that communications by the trial judge with the jury in the absence of counsel are presumed to be prejudicial if the record fails to disclose what the actual communication was. It is a fact that in the case sub judice there were no communications between the trial judge and the jury. The matter referred to by the petitioner was clearly not a social occasion as in the case of People v. Silverman, N.Y. Supr.App.Div, 297 N.Y.S.



449(1937) cited by the petitioner. The dinner was clearly a matter of convenience in order to satisfy the need for food during the wait for the jury's verdict.

The petitioner claims that the accompaniment of the jury by certain police officers who were witnesses in the case is not in accord with this Court's decision in Turner v. Louisiana, 379 U.S. 466(1965). It is clear however that the incident in Turner, supra is comparable to this case only if one looks at the surface of the matter and chooses to ignore the actual facts. The record is clear in the case sub judice that the jury was not in the charge of these police officers but was in fact in the charge of the sworn bailiffs who insulated them from all contact with anyone. In Turner, supra there was clearly contact and communication between the jurors and witnesses-the full extent of that could only be speculated upon as to its content and effect. In this case

the record reveals exactly what occurred and it leaves no room for speculation as to contact or prejudice. That fact is most important because it does not present a situation wherein there is some likelihood of ingratiation on the part of the witnesses with the jury or prejudicial conversations.

The record in this case reveals that there is no new federal question of substance and that the decision of the Delaware Supreme Court is in harmony with previous decisions of this Court.

B. The Defendant's Due Process Rights Were Not Violated by the Prosecution in Cross-Examination or Closing Argument Because the Main Argument Referred to by Petitioner Concerned Trial Strategy and the Defendant Incriminated Himself at the Time of Arrest and Did Not Remain Silent.

The second reason urged by the petitioner that this Court should review the decision of the Delaware Supreme Court rests on two basic assumptions. The first is that the petitioner



was silent at the time of his arrest and after being given his Miranda warnings. The second is that the prosecution used this silence against him in a manner which has been ruled impermissible by this Court in United States v. Hale, 95 S.Ct. 2133(1975) and Doyle v. Ohio, 96 S.Ct. 2240, 49 L. Ed. 91(1976). Neither of these assumptions is in accord with the facts.

Both the State's case and the defense are set out in some detail at the beginning of the opinion of the Delaware Supreme Court. It is apparent that the defendant admitted virtually every aspect of the State's case at trial. He admitted that he drove up to the scene in his car, that he chased the victim, that he had something in his hand and that he fled the scene and hid from the police. However he stated that he did not have a gun in his hand but rather he had a car door handle. Thus the issue in the case can be summarized in one line; did the defendant have a gun with him or not? Clearly, considering all the other admitted circumstances,

if the defendant had a gun, then he was the one who shot the girl. After being given his Miranda warnings the defendant told the police that he had disposed of the gun which he had at the scene of the shooting by throwing it into the river. He also argued with them concerning his opportunity to effectuate that disposal of the weapon. It may be that merely opening one's mouth to say one's name or some other harmless matter does not obviate a finding of silence but surely the type of incriminating statement made by this defendant (which he recanted at trial because it was so obviously inconsistent with the rest of his exculpatory testimony) cannot be branded as "silence". See Jackson v. State, 19 Cr.L. 2109, Tenn. Sup.Ct(1976).

The argument claimed by the prosecution to be "the most probative" and quoted at length in the opinion of the Delaware Supreme Court clearly dealt with the fact that the defendant did not mention the identity of the black man whom he claimed did the shooting until cross-



examination. The person named was a principal State's witness and the theory advanced by the State was that the defense was reluctant to accuse that person specifically because it would make the weakness of that assertion too obvious to the jury. It was emphasized that on direct examination the defendant blamed a black man but did not name him. This was clearly not a comment upon the defendant's silence-assuming arguendo that the concept of silence could survive the incriminating statement made by the defendant.

The defendant explained at trial that he had hidden from the police in the hope that his father would return and help him explain the incident to the police. The proseuction questioned how such an explanation of hiding from the police was consistent with the defendant's assertion that he had done nothing wrong. Moreover, the prosecution pointed out that the defendant chose to tell the police that he had a gun at the scene of the shooting and that he had disposed of that gun rather than tell them the

exculpatory version which he offered at trial which was built upon his claim that he did not have a gun.

> The first thing he said was, "I threw the gun in the river by the police pistol range". The first thing he said was not, "am I glad to see you, I was scared they were going to pin it on me and I didn't do it". He didn't say that. He said "I threw the gun in the river by the police pistol range".

Such inconsistency is clearly probative and does not amount to a denial of due process. CF Harris v. New York, 401 U.S. 222(1971).

Therefore, the decision of the Supreme Court of Delaware was in conformity with previous decisions of this Court.

C. The Petitioner's Presumption of Innocence Was Not Destroyed Before Trial Nor Before the Verdict was Rendered.

The petitioner has offered as his final reason why this Court should review the decision of the Delaware Supreme Court a general argument that his presumption of innocence was destroyed by various factors which were part of the trial.



The trial court considered the motion of the petitioner for a change of venue and conditionally denied the motion. The trial court stated that the normal jury selection process in a capital case, which included extensive voir dire, would be followed and it it was not possible to impanel an impartial jury by this method, the venue of the trial would immediately be changed to Sussex County (one of the three counties in Delaware). The actual voir dire went through approximately 110 prospective jurors from which five were dismissed because of an opinion as to the defendant's guilt, and three were dismissed because of a closed position that he was innocent. The great majority of the array testified that they would decide the case based upon the evidence at trial. This is the important test:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is

> particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717 at 722(1961).

It should also be noted, as recognized in Parson v. State, Del.Supr. 222 A.2d 326, 336(1966), rev'd on other grounds; that Delaware is an extremely small state which is served by one major newspaper and therefore the same news is dispersed throughout the state. Thus the trial court's action was reasonable and within its sound discretion.

Moreover it is clear that the sequestration of jurors is also a matter which is controlled by the sound exercise of discretion by the trial judge. The petitioner has not attempted to show any actual prejudice which resulted from this discretionary decision of the trial judge. See



Margolis v. United States, 407 F.2d 727 (7th Cir. 1969).

It is submitted that the petitioner has grouped together matters which were handled by the trial court within the bounds of its discretion, reviewed by the highest court of this state favorably, and attempted to create by the repetition of his first argument an issue which should be decided by this Court. A close examination of each point reveals no reversible error and the grouping of these matters does not create a situation wherein the Delaware Supreme Court has rendered a decision in conflict with the previous holdings of this Court.

## CONCLUSION

The respondent submits that the petition does not contain sufficiently special and important reasons to grant review of the decision of the Delaware Supreme Court on writ of certiorari.

Respectfully submitted,

Richard R. Wier
Attorney General
State of Delaware
Richard J. McMahon
Deputy Attorney General